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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Negaunee, Michigan))

RM - _____

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Chief, Allocations Branch
Policy & Rules Division (Mass Media Bureau)

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PETITION FOR RULE MAKING

Comes now **Todd Stuart Noordyk** ("Noordyk"), applicant for a new FM Construction Permit on Channel 258A at Negaunee, Michigan (FCC File No. BPH-951013MB), by Counsel, pursuant to §1.401 of the Commission's Rules, and hereby seeks the institution of a rule making proceeding to amend Section 73.202(b) of the Commission's Rules, the FM Table of Allotments, to add Channel 273A to Negaunee, Michigan, and order the amendment of the application of Goetz Communications Corporation ("Goetz")(FCC File No. BPH-951011MC) to specify Channel 273A in lieu of Channel 258A while maintaining cut-off protection for the application.¹ Also, in the event that one or more expressions of interest are received in the course of this proceeding for an additional allotment at Negaunee, Michigan, it is noted that Channel

¹ In response to the Commission's "Report and Order" in MM Docket No. 95-29, DA 95-1646 (released July 31, 1995), both Noordyk and Goetz submitted mutually-exclusive competing applications for Negaunee. This rule making proposal seeks the resolution of the mutual-exclusivity by permitting the award of an FM Class A Construction Permit to both applicants.

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289A may be allotted to Negaunee to accommodate those expressions of interest.

Thus, the following changes are proposed to the FM Table of Allotments:

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Negaunee, Michigan	258A	258A, 273A, 289A

The allotment of Channel 273A may be made at the site presently proposed in Goetz' application -- namely, North Latitude 46 - 30 - 51, West Longitude 87 - 28 - 54. The allotment of Channel 289A (if required for any additional expressions of interest) may be made at the reference coordinates for Negaunee, Michigan of North Latitude 46 - 30 - 18, West Longitude 87 - 36 - 24. Attached to this petition is a channel study prepared by Jefferson G. Brock of Graham Brock, Inc. wherein it is demonstrated that each of the proposed channels are fully spaced in compliance with §73.207 of the Commission's rules.

In support of this petition, Noordyk submits the following:

1. This petition proposes to eliminate the mutual exclusivity between the two cut-off applications for new Class A FM facilities at Negaunee, Michigan. At the present time there is no basis upon which to either designate the applications for a comparative hearing, or to otherwise resolve the mutual exclusivity. *See e.g., Bechtel V. Federal Communications Commission, 74 RR 2d 348 (D.C. Cir. 1993).* By the allotment of Channel 273A to Negaunee, Michigan, both pending applications may be

granted. If any additional expressions of interest are filed for an additional channel, Channel 289A may be allotted to Negaunee, Michigan.

2. This petition is consistent with the following recent Commission rulings:

Report and Order, DA 95-2493 (MM Docket 95-138; RM-8684)(released January 26, 1996) at Casper, Wyoming.

Report and Order, DA 95-2494 (MM Docket 95-98; RM-8603)(released January 26, 1996) at Cheyenne and Saratoga, Wyoming.

Report and Order, DA 95-2492 (MM Docket 95-136; RM-8682)(released January 26, 1996) at Sioux Falls, South Dakota.

3. The Commission's recent decision in *Albion, Nebraska*, 10 FCC Rcd. 3183 (1995), *app. for review denied*, FCC 95-265 (released June 27, 1995) is likewise consistent with the action requested here. In *Albion, Nebraska* a new television channel was allotted to Albion and a mutually exclusive applicant for another Albion channel was allowed to amend its application to the new channel without loss of cut-off protection.

4. The procedure proposed in this petition is also consistent with *Lander, Wyoming*, 46 Fed. Reg. 39605 (published August 4, 1981). In *Lander, Wyoming*, the Commission had before it two pending applications for VHF-TV Channel 4 at Lander, Wyoming. One applicant was seeking a non-commercial educational station on Channel 4, and the other applicant was seeking a commercial station on Channel 4. Funding for the non-commercial educational

applicant was conditioned upon the use of Channel 4. The Commission held that the earliest initiation of service by the allotment of another channel would be the best solution to the proceeding. Accordingly, the Commission in *Lander, Wyoming* reserved Channel 4 for non-commercial educational use, allotted Channel 5 and allowed the commercial applicant to retain cut-off protection while amending its application to Channel 5. The Commission held that:

The retention of cut-off protection is warranted here since any other interested commercial applicant already had the opportunity to apply for a Lander station by the recent availability of Channel 4 and none expressed an interest in doing so.

5. A like situation exists in this Channel 258A proceeding at Negaunee, Michigan in which two mutually exclusive applicants have each applied for the same channel. The Filing Window has opened and closed. Any other applicants that may have had an interest in applying for a Class A station at Negaunee, Michigan have already had an opportunity to do so. On this basis alone, it is submitted that the allotment of an additional channel to Negaunee to allow both applicants to move forward while retaining cut-off protection would be fully consistent with the procedure established in *Albion, Nebraska* and *Lander, Wyoming*.

6. The public interest would be well served by the early initiation of service to Negaunee from both applicants. There would be a reduction in the burdens on the Commission's processing resources by the elimination of the need for the designation for hearing of the mutually exclusive applications or

the implementation of any alternative resolution method the Commission might ultimately adopt./²

7. In the event that an interest is expressed by any other party in providing additional service to Negaunee, Michigan, there is an additional channel that may be allotted to Negaunee, Michigan to accommodate such an interest. The allotment of such an additional channel is in the public interest in the event an expression of interest is filed in this proceeding for such an additional channel. See e.g., *Modification of FM and Television Station Licenses*, 98 FCC 2d 916, 920 (1984). Making the additional channel available would be fully in accord with the strictures of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). As the Commission has noted in granting modification of licenses for existing stations to non-mutually exclusive channels, "the opportunity for filing for [an equivalent] channel is the only obligation [the Commission] must fulfill to comply with *Ashbacker*." See, *Helena, Montana*, 50 RR 2d 70, 71 (1981).

8. Upon the allotment of Channel 273A to Negaunee, Michigan, the reservation of Channel 273A for the application of Goetz with cut-off protection, and the submission of Goetz' amendment specifying Channel 273A

² A grant of the allotments and relief requested in this filing enables the settlement of the mutually exclusive proceeding between the two parties for Channel 258A. Commission precedent generally favors settlements as a way of reducing the time, cost and uncertainty of protracted litigation. See generally, *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057 (1988).

for its proposed facility, Noordyk will reimburse Goetz for the reasonable and prudent expenses associated in amending its application to specify the new channel. Likewise, when authorized, Noordyk will promptly construct his new station on Channel 258 at Negaunee, Michigan.

9. Discussions with counsel for Goetz: Prior to the submission of this Petition, counsel for Noordyk held several telephone discussions with counsel for Goetz in an attempt to obtain Goetz' consent for the proposal set forth herein. Counsel for Goetz recently indicated that Goetz had not yet decided to support this proposal, and indicated that Goetz was not sure that Negaunee could support two (or possibly three) new stations.

Although it is possible that Goetz may eventually support this proposal, the Commission does not need to obtain Goetz' consent to act favorably upon this proposal. The public interest would be well served by the early initiation of service to Negaunee from both applicants. There would be a reduction in the burdens on the Commission's processing resources by the elimination of the need for the designation for hearing of the mutually exclusive applications or the implementation of any alternative resolution method the Commission might ultimately adopt. In situations such as this, the Commission long ago made it clear that it does "not contemplate refusing an assignment on economic or competitive grounds." *See, Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 103 (1982) at para. 39.*

WHEREFORE, the above premises considered, it is respectfully requested that a rule making proceeding be commenced looking for the allotment of Channel 273A to Negaunee, Michigan, and a reservation of Channel 273A for the amended application of Goetz in order to resolve the mutual exclusivity now existing on Channel 258A at Negaunee, Michigan.

Respectfully submitted,

TODD STUART NOORDYK

By: 
Cary S. Tepper

His Attorney

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February 9, 1996

GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS

**PETITION FOR RULEMAKING
ALLOT CHANNEL 273A
NEGAUNEE, MICHIGAN
February 1996**

TECHNICAL EXHIBIT

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**PETITION FOR RULEMAKING
ALLOT CHANNEL 273A
NEGAUNEE, MICHIGAN
February 1996**

TECHNICAL STATEMENT

This Technical Statement and attached exhibits were prepared on behalf of Todd Stuart Noordyk ("Noordyk"), an applicant seeking authority to construct a new FM radio station on Channel 258A at Negaunee, Michigan. In addition to the application filed by Noordyk during the filing window for Channel 258A at Negaunee, Goetz Communications Corporation filed a mutually exclusive application. No other applications were filed during this period.

In an effort to remove the mutually exclusivity between the two applicants at Negaunee, Noordyk has determined there are alternative Class A channels available for allotment to the community which would remove the conflict between the proposals. This would enable both Noordyk and Goetz to move forward with construction of a new FM facility at Negaunee. With no comparative hearings to resolve mutually exclusive applications, this instant petition for rulemaking will enable the institution of two new services in Negaunee.

Noordyk has determined that Channel 273A is available for allotment at Negaunee at the site specified in the Goetz application (File #951011NC) at reference coordinates North Latitude 46° 30' 51" and West Longitude 87° 28' 54". Exhibit #1 is a \$73.207 spacing study which indicates that at this reference site Channel 273A complies with the Commission's minimum

distance separation requirements to all licensed, applied for or proposed facilities. Noordyk, therefore, requests that Goetz be ordered to amend its application to specify Channel 273A in lieu of Channel 258A at Negaunee.

In order to provide an equivalent class channel for other potential expressions of interest, Noordyk has also determined that Channel 289A can be allotted to Negaunee, Michigan, at geographic coordinates North Latitude 46° 30' 18" and West Longitude 87° 36' 24".¹ Exhibit #2 is a usable area study which denotes where a transmitter site could be located for Channel 289A at Negaunee. Exhibit #3 is a §73.207 spacing study demonstrating that from the proposed reference site Channel 289A meets the Commission's minimum distance separation requirements to all licensed, applied for or proposed facilities. A 3.16 mV/m contour would be placed over all of Negaunee from the proposed reference site.

Therefore, Noordyk proposes the following amendment to §73.202(b) of the Commission's rules.

Negaunee, Michigan

Present

Proposed

258A

258A, 273A, 289A²

-
- 1) Without the imposition of a site restriction. This is the same reference site as the Channel 258A allotment site at Negaunee.
 - 2) Channel 289A is proposed for other expression of interest. Allotment of this channel would not be necessary if no interest was expressed during the comment period of this proceeding.

Noordyk requests that Channel 273A be allotted to Negaunee, Michigan, and that Goetz Communications Corporation be ordered to amend its pending application at Negaunee to specify operation on Channel 273A in lieu of Channel 258A. In addition, as indicated above, should there be expressions of interest in a Class A channel at Negaunee, Channel 289A can be allotted in compliance with the Commission's rules and regulations.

The foregoing Technical Statement was prepared on behalf of Todd Stuart Noordyk by Graham Brock, Inc., his Technical Consultants. All information contained herein is true and accurate to the best of our belief and knowledge. All data related to FM allotments was extracted from the NTIA database as updated on February 2, 1996. We assume no liability for errors or omissions in that database which may be adverse to the requests contained herein.

**ALLOCATION STUDY FOR NEGAUNEE, MICHIGAN
USING GOETZ COMMUNICATIONS SITE AS REFERENCE**

REFERENCE	CLASS A	DISPLAY DATES
46 30 51 N		DATA 02-02-96
87 28 54 W	Current rules spacings	SEARCH 02-08-96
----- CHANNEL 273 -102.5 MHz -----		

CALL TYPE	CH# LAT	CITY LNG	STATE PWR	BEAR' HT	D-KM D-Mi	R-KM R-Mi	MARGIN (KM)
AD273	273A	Negaunee	MI	0.0	0.00	115.0	-115.00
AD	46 30 51	87 28 54	0.000 kW	0M	0.0	71.5	
Proposed for Goetz Communications Corporation							
WAAH.C	272C2	Houghton	MI	308.8	105.67	106.0	-0.33
CP CN	47 06 13	88 34 04	36.000 kW	150M	65.7	65.9	
Houghton Radio Group BPH-930426IA							
WAAH	272A	Houghton	MI	308.8	105.67	72.0	33.67
LI CN	47 06 13	88 34 04	1.050 kW	169M	65.7	44.8	
Houghton Radio Group BLH-920903KB							
WRVM	274C1	Suring	WI	203.2	183.02	133.0	50.02
LI CN	44 59 50	88 23 49	100.000 kW	299M	113.8	82.7	
WRVM, Inc. BLH-920702KE							
WMTUFM	220A	Houghton	MI	310.1	105.69	10.0	95.69
LI CN	47 07 12	88 32 56	0.100 kW	5M	65.7	6.2	
Michigan Technological University BLED-940128KA							

CHANNEL 273A SPACING STUDY

* NOTE : THE SHORTAGE TO THE OUTSTANDING
WAAH CP AT HOUGHTON, MI IS SHOWN
AS -0.33 KM. SINCE THIS DISTANCE
IS LESS THAN 0.5 KILOMETERS IS
ROUNDS TO ZERO. THIS PROPOSAL IS
THEREFORE CLEAR OF WAAH.

**EXHIBIT #1
PETITION FOR RULE MAKING
TODD STUART NOORDYK
ALLOT CHANNEL 273A
NEGAUNEE, MICHIGAN**

February 1996

GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS



CHANNEL 289A USABLE AREA

MAP IS A PORTION OF THE 1: 500, 000 SCALE
 U.S.G.S. BASE MAP OF MICHIGAN.

EXHIBIT #2

PETITION FOR RULE MAKING
 TODD STUART NOORDYK
 ALLOT CHANNEL 273A
 NEGAUNEE, MICHIGAN

February 1996

SCALE 1: 500, 000



GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS

**ALLOCATION STUDY FOR NEGAUNEE, MICHIGAN
USING CH 258A ALLOCATION SITE AS REFERENCE**

REFERENCE	CLASS A	DISPLAY DATES
46 30 18 N		DATA 02-02-96
87 36 24 W	Current rules spacings	SEARCH 02-08-96
----- CHANNEL 289 -105.7 MHz -----		

CALL TYPE	CH# LAT	CITY LNG	STATE PWR	BEAR/ HT	D-KM D-Mi	R-KM R-Mi	MARGIN (KM)
AD289	289A	Megaunee	MI	0.0	0.00	115.0	-115.00
AD	46 30 18	87 36 24	0.000 kW	OM	0.0	71.5	
Todd Stuart Noordyk - Alternate Channel							
WAPLFM	289C	Appleton	WI	187.2	240.35	226.0	14.35
LI CN	44 21 32	87 59 07	100.000 kW	358M	149.4	140.5	
Woodward Communications, Inc. BLH-880408KB							
WENL.C	288A	Gladstone	MI	154.0	89.33	72.0	17.33
CPM CN	45 46 56	87 06 04	6.000 kW	78M	55.5	44.8	
Zephyr Broadcasting Inc. BMPH-900208IC 920528							
WCUP.C	291C2	L'Anse	MI	293.7	77.37	55.0	22.37
CP CN	46 46 48	88 32 06	50.000 kW	76M	48.1	34.2	
L'Anse Broadcasting, Inc. BPH-930505MC 961102							
AL290	290C	Terrace Bay	ON	7.8	255.74	195.0	60.74
AL	48 47 00	87 08 00	0.000 kW	OM	158.9	121.2	
WFON.C	292C2	Stephenson	MI	182.2	136.35	55.0	81.35
CP CN	45 16 45	87 40 26	25.500 kW	150M	84.7	34.2	
Pacer Radio of the Near-North BPH-910719MB 951220							
WRLOFM	287C1	Antigo	WI	223.7	173.49	75.0	98.49
LI DCN	45 22 04	89 08 20	100.000 kW	165M	107.8	46.6	
Ad-Mark Communications, Inc. BLH-851030KB							

CHANNEL 289A SPACING STUDY

**EXHIBIT #3
PETITION FOR RULE MAKING
TODD STUART NOORDYK
ALLOT CHANNEL 273A
NEGAUNEE, MICHIGAN**

February 1996

GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS

AFFIDAVIT AND QUALIFICATIONS OF CONSULTANT

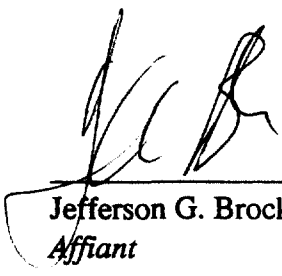
State of Georgia)
St. Simons Island) ss:
County of Glynn)

JEFFERSON G. BROCK, being duly sworn, deposes and says that he is an officer of Graham Brock, Inc. Graham Brock has been engaged by Todd Stuart Noordyk to prepare the attached Technical Exhibit.

His qualifications are a matter of record before the Federal Communications Commission. He has been active in Broadcast Engineering since 1979.


The attached report was either prepared by him or under his direction and all material and exhibits attached hereto are believed to be true and correct.

This the 8th day of February, 1996.



Jefferson G. Brock
Affiant

Sworn to and subscribed before me
this the 8th day of February, 1996



Notary Public, State of Georgia
My Commission Expires: September 12, 1999

CERTIFICATE OF SERVICE

I, Cary S. Tepper, Esquire, hereby certify that on this 9th day of February, 1996, I have served a copy of the foregoing "**Petition for Rule Making**" first-class, postage-prepaid, on the following:

*John A. Karousos
Chief, Allocations Branch
Federal Communications Commission
2025 M Street, N.W.; Room 8010
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Jerrold D. Miller, Esquire
Miller & Miller, P.C.
1990 M Street, N.W.
Suite 760
Washington, D.C. 20036
(Counsel to Goetz Communications Corporation)

A handwritten signature in black ink, appearing to read 'Cary Tepper', is written over a horizontal line.

Cary S. Tepper, Esq.

*/ indicates delivery by hand